prejudiced by the article. The Court overruled the motion and its action is specified by the appellant as an error. The published article was a rather sensational report of a rather extended interview, but the only portions which could be said to have any direct influence upon the mind of a juror were the statement that the witness Clough had the greatest admiration for the lowest prostitute when compared to his own contempt for city officials who accept money for permission to operate, and his reference to unscrupulous politicians and pay-offs as the curse of America. The rest of the article related to the Mayor's views regarding the toleration of prostitution. In urging that the District Court erred, the appellant quotes from *American Jurisprudence* as follows:

> "It is improper for jurors to read newspaper accounts of the progress of a trial or relating to the case on trial. But a new trial should not be granted by a trial court because thereof unless the facts are such that it cannot determine with reasonable certainty whether the result was effected. Nor is a verdict vitiated by the finding of a newspaper in the jury room where the jury had no knowledge of its contents." 53 *Am. Jur.* 644, Trial Para. 895

In the pocket supplement to the above-cited volume the editors have made an addition to the foregoing text in these words:

> "It is within the discretion of the trial Court as to whether, after impanelment, during a criminal trial, the jurors may be interrogated or polled as to whether they have read newspaper articles pertaining to the alleged crime or the trial." 1955 Cum. Supp. Vol. 53, *Am. Jur.* p. 40. See Annotation 15 A.L.R. 2d 1152.

This Court, considering a similar question, in a case where the Government had been permitted to impeach its own witness and the press reported upon the impeachment and the subsequent arrest of the witness for perjury, said:

> "On the day following impeachment of the witness Diaz, appellant presented to the court a written motion for a mistrial, to which was attached the front page of an El Paso morning newspaper containing an account of the arrest of Diaz for perjury in denying receipt of the stolen property from appellant. Appellant orally informed the Court that similar accounts had been broadcast over the El Paso radio stations. The court overruled this motion, and denied a request by appellant that the jurors be interrogated relative to their knowledge of the radio and newspaper reports in connection with the case, and further instructed them, in case such reports had already reached the jury, that they should not be considered for any purpose." *Apodac v. United States*, 5th Cir. 1953, 200 F. 2d 775.

The appellant does not complain that no further instruction was given the jury, and of course would not be heard in the making of such a complaint as no instruction was requested. The refusal to permit interrogation of the jury regarding the newspaper article was not error.

Other questions raised are without merit and do not require discussion. The judgment before us on appeal is AFFIRMED.

A TRUE COPY:

TESTE

/s/ JOHN A. FEEHAN, JR.
Clerk of the United States Court of
Appeals for the Fifth Circuit.

APPENDIX C

JUDGMENT

Extract from the Minutes of April 19, 1956.

No. 15672

FRED M. FORD,
VERSUS
UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby denied.

* * *

I, Douglas W. McGregor, attorney for Petitioner, Fred M. Ford, hereby certify that on the 18th day of June, 1956, I served copies of the foregoing Petition for Certiorari on the United States by mailing a copy thereof in a duly addressed envelope to Honorable Russell B. Wine, United States District Attorney for the Western District of Texas, Post Office Box 1701, San Antonio, Texas, and by mailing a copy to The Solicitor General, Department of Justice, Washington, D. C., with air mail postage prepaid.

Douglas W. McGregor

DOUGLAS W. MCGREGOR
Attorney for Petitioner
2331 Gulf Building
Houston 2, Texas

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 180

FRED M. FORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 14–23) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 19, 1956 (Pet. 24) and a petition for rehearing was denied on May 22, 1956. The petition for a writ of certiorari was filed on June 19, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether, as a condition precedent to use of the net worth method of proof in a prosecution for wilful at-

tempted evasion of income taxes, the Government must show a determination of the exact amount of the defendant's civil income tax liability by the Commissioner of Internal Revenue.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

On February 27, 1952, petitioner was indicted in the United States District Court for the Western District of Texas on three counts of wilful attempted evasion of individual income taxes for the years 1945 through 1947, in violation of Section 145 (b) of the Internal Revenue Code of 1939. After a jury trial petitioner was

convicted, but the Court of Appeals reversed for errors in the admission and exclusion of evidence. *Ford* v. *United States*, 210 F. 2d 313 (C. A. 5th). After a second jury trial, lasting approximately five days, petitioner was again convicted on all counts. (R. 586.) On June 28, 1955, he was given a general sentence of four years' imprisonment. (R. 587, 609.) The Court of Appeals affirmed. (Pet. 14–23.)

The Government's evidence showed that petitioner was employed by the Galveston Police Department from 1925 until 1947, when he was fired as chief of police; that his reported income for the prosecution years totalled $8,807.10; that his correct income, computed by the net worth-expenditures method, was $42,863.91; that he dealt entirely in currency; and that in addition to his reported income (which consisted entirely of his salary as chief of police) petitioner had income from gambling and from protection payments from the operator of a house of prostitution. The defense consisted of the testimony of two character witnesses. (R. 29, 34, 39, 369–370, 387–388, 409–439, 552–568.)

ARGUMENT

Petitioner's sole contention—that in a criminal prosecution for income tax evasion based on the net worth-expenditures method the Government must put into evidence a determination of the defendant's civil tax liability by the Commissioner of Internal Revenue—is patently insubstantial. The point does not appear to have been raised since the earliest days of income tax evasion prosecutions, when it was found to be without merit in *Guzik* v. *United States*, 54 F.

2d 618, 619 (C. A. 7th), certiorari denied, 285 U. S. 545 and *Commerford* v. *United States*, 64 F. 2d 28, 30 (C. A. 2d), certiorari denied, 289 U. S. 759.[1] The contention apparently grew out of certain language used in *Capone* v. *United States*, 51 F. 2d 609, 619 (C. A. 7th), certiorari denied, 284 U. S. 669, and now relied upon by petitioner. (Pet. 6–7.) In that case, however, the court was dealing with Capone's contention that the Government had not proved a count alleging that he had wilfully refused to pay certain taxes which had actually been assessed against him by the Commissioner. The language relied on has nothing to do with the crime of attempting to evade income taxes, which is complete when the taxpayer wilfully and knowingly files a false return with intent to defeat or evade a substantial part of the tax due. *United States* v. *Yeoman-Henderson, Inc.*, 193 F. 2d 867, 869 (C. A. 7th) and cases cited; *Guzik* v. *United States, supra.* The statutory provisions relied upon by petitioner (Pet. 11–12—Sections 272 (a) (1), 3612 (a) and 3612 (f) of the Internal Revenue Code of 1939) plainly concern only the civil aspects of tax assessment and collection, and petitioner's argument arises from a confusion of the civil and criminal aspects of the revenue laws. Civil tax cases are disputes between the taxpayer and the Commissioner. The question is the *exact* amount of tax owed, and the burden of proof rests upon the taxpayer to show that the Commissioner's determination is erroneous. In criminal cases, however, the burden of proof is

[1] These were not net worth cases, though *Guzik* was based mainly on bank deposits.

on the Government, but the Government need only prove that the defendant fraudulently evaded *some* of his income taxes; it does "not have to prove the exact amounts of unreported income." *United States* v. *Johnson,* 319 U. S. 503, 517.[2] In any event, the Government could not, even if it would, put into evidence the Commissioner's determination because it would be irrelevant to the issues in the criminal case and incompetent as hearsay.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

JULY 1956.

[2] This Court has recognized that the net worth proof is required to establish only a reasonable approximation of the amount of unreported income. *Holland* v. *United States*, 348 U. S. 121, 129, 135. Cf. also, *Goldbaum* v. *United States*, 204 F. 2d 74, 78 (C. A. 9th), certiorari denied: 346 U. S. 831; *Leeby* v. *United States*, 192 F. 2d 331, 334 (C. A. 8th); *Goodelman* v. *United States*, 191 F. 2d 993, 996 (C. A. 9th), certiorari denied, 342 U. S. 909; *United States* v. *Schenck*, 126 F. 2d 702, 704 (C. A. 2d), certiorari denied *sub nom Moskowitz* v. *United States*, 316 U. S. 705; *Tinkoff* v. *United States*, 86 F. 2d 868, 878 (C. A. 7th), certiorari denied, 301 U. S. 689; *Gleckman* v. *United States*, 80 F. 2d 394, 399–401 (C. A. 8th), certiorari denied, 297 U. S. 709.

U. S. GOVERNMENT PRINTING OFFICE : 1956